

No. 15563

United States
Court of Appeals
for the Ninth Circuit

J. G. SHOTWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington.
Northern Division.

FILED

AUG 21 1957

PAUL P O B H E N, CLERK



No. 15563

United States
Court of Appeals
for the Ninth Circuit

J. G. SHOTWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	14
Certificate of Clerk.....	52
Complaint	3
Ex. A—Contract	7
B—Letter Dated June 28, 1950.....	12
Counsel, Names and Addresses of.....	1
Decision on Motions for Summary Judgment..	40
Joint Stipulation of Facts.....	40
Judgment	50
Motion for Summary Judgment, Defendant's..	39
Motion for Summary Judgment, Plaintiff's....	16
Affidavit of Shotwell, J. G.....	17
Ex. D—Contract	23
F—Letter Dated June 12, 1951...	29
G—Letter Dated September 6, 1951	35
Notice of Appeal.....	51
Points to Be Relied Upon by Appellant.....	55

NAMES AND ADDRESSES OF COUNSEL

MEREDITH M. DAUBIN,

1038 Natl. Press Bldg.,

Washington 4, D. C.;

ZUNDEL, MERGES, BRAIN & ISAAC,

1001 New World Life Bldg.,

Seattle 4, Washington,

Attorneys for Appellant.

CHARLES P. MORIARTY and

THOMAS R. WINTER,

1012 U. S. Court House,

Seattle 4, Washington;

CHARLES K. RICE,

Asst. U. S. Atty. General,

Dept. of Justice,

Washington 25, D. C.,

Attorneys for Appellee.

1880

1881

1882

1883

1884

1885

United States District Court for the District
of Washington, Western District, Northern
Division

Civil Action No. 3826

J. G. SHOTWELL,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR FEDERAL TRANSPORTA-
TION TAX ERRONEOUSLY ASSESSED
AND COLLECTED

The Plaintiff, J. G. Shotwell, alleges as follows:

1. Plaintiff is and was at all times hereinafter mentioned an individual who is a citizen of the United States of America and whose present address is 5908 South East 20th Street, Mercer Island, Washington, former address, Umatilla, Oregon.

2. This action arises to recover taxes collected under Section 3475 of the Internal Revenue Code on the transportation of property, said taxes were collected by Hugh H. Earle as the Collector of Internal Revenue for the District of Oregon, Portland, Oregon; he is not now the Collector of Internal Revenue for the District of Oregon and he is now out of the said office. The amount involved exceeds \$3,000.00.

This Court has jurisdiction over this action under Section 1346 (a) (1) of the Judicial Code as amended (28 U.S.C. Sec. 1346 (a) (1)), and the United States of America is named Defendant in pursuance thereof.

3. July 29, 1948, the Department of the Army, the United States of America, contracted with the Plaintiff to move large quantities of coarse and fine aggregates to the McNary Dam, Umatilla, Oregon, to be used by the Government and to be incorporated in the McNary Dam. The coarse and fine aggregates were located on Berrian Island, Washington, which is a Government owned property five miles upstream from the McNary Dam site. A photostat copy of the contract is attached as Exhibit A.

4. The haul road from Berrian Island, Washington, to the McNary Dam site was on Government owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam, determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure.

A copy of a letter from the District Engineer, Corps of Engineers, United States Army, dated June 28, 1950, is attached as Exhibit B.

5. The Plaintiff secured Keith Williams to engage jointly with the Plaintiff in the movement of

the aggregates by use of equipment to be secured by Keith Williams for that purpose.

The Plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the total amount of \$505,606.54 under a subcontract under the above-mentioned contract of July 29, 1948 (Exhibit A attached), for the movement of the aggregates from the Government owned property on Berrian Island over Government owned haul roads to the McNary Dam site in performance by Plaintiff under the contract of July 29, 1948.

6. The Collector of Internal Revenue assessed to the Plaintiff and the Plaintiff has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as federal transportation tax under Section 3475 of the Internal Revenue Code at 3 per cent on the above amount of \$505,606.54.

7. The work to be performed by the Plaintiff under his contract of July 29, 1948 (Exhibit A attached), and which was performed, did not constitute the movement of property from one point in the United States to another within the meaning of Section 3475 of the Internal Revenue Code.

8. The work performed by the said Keith Williams under the subcontract with the plaintiff did not constitute the movement of property from one point in the United States to another point within the meaning of Section 3475 of the Internal Revenue Code.

9. April 28, 1952, the Plaintiff filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for refund of \$15,168.20 as an overpayment of the tax on transportation of property illegally assessed and collected in November and December, 1951.

A copy of the claim is attached as Exhibit C.

10. A period of more than six months has elapsed since the filing of the said claim for the refund of the federal transportation tax of \$15,168.20, which claim has not been rejected by the Commissioner of Internal Revenue.

11. By reason of the premises there has been erroneously and illegally exacted and collected from the Plaintiff the sum of \$15,168.20, as aforesaid for the reason set forth hereinabove and in the claim for refund, Exhibit C, is incorporated herein by reference and although payment of the said sum to the Plaintiff has been duly demanded by Plaintiff, no part thereof has been refunded, paid or credited to the Plaintiff and Defendant has retained and still retains said sum and has refused and still refuses to pay said sum or any part thereof.

12. Defendant owes Plaintiff the sum of \$15,168.20, together with interest thereon from the respective dates on which it was paid to the Collector of Internal Revenue for the District of Oregon at Portland, Oregon.

Wherefore, Plaintiff demands judgment against Defendant for the sum of \$15,168.20, together with

interest thereon from the respective dates on which it was paid and the costs and disbursements of this action.

/s/ MEREDITH M. DAUBIN,
ZUNDEL, DANZ, BRAIN &
ISAAC.

Duly verified.

EXHIBIT A

Contract No. W35-026-eng-5686

Supply Contract
Department of the Army

Contractor and Address:

J. G. SHOTWELL,
215 South Third,
Albuquerque, New Mexico.

Contract for:

Furnishing Concrete Aggregate for McNary
Dam.

Amount:

\$1,498,200.00 (Estimated).

Location:

McNary Dam, Oregon and Washington.

Payment:

To be made by the Disbursing Officer, Corps of
Engineers, at 628 Pittock Block, Portland 5,
Oregon.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotments, the available balances of which are sufficient to cover the cost of the same:

Appropriation:

21x3000 Columbia River, Oregon and Washington, Umatilla (McNary Dam).

W.D. Form No. 1 (Civil)

1 Nov., 1946

Portland District Letterhead

NPPSP

August 26, 1948.

Registered

J. G. Shotwell,
St. John,
Washington.

Dear Sir:

There is inclosed for your file contractor's number of Contract No. W35-026-eng-5686, for furnishing concrete aggregate for McNary Dam.

Your attention is invited to paragraph SC-1 of the specifications which stipulates that "The Contractor will be required to commence the establishment of the necessary plant for production of aggregate under this contract within 10 calendar days after the date of receipt by him of notice to

proceed, to prosecute said work with faithfulness and energy, and to deliver materials in the sizes and quantities as provided for in paragraph SC-4." You are hereby notified to proceed with the work.

This notice is sent to you in triplicate. Please insert the date of receipt and sign in the space provided below on the original and one copy hereof and return them to this office retaining one copy for your file.

Very truly yours,

/s/ O. E. WALSH,

Colonel, Corps of Engineers,
District Engineer.

1 Incl.: Contract.

The contract and above notice to proceed were received by the undersigned August 30th, 1948.

J. G. SHOTWELL,

By /s/ J. G. SHOTWELL.

Contract for Supplies

This Contract, entered into this 29th day of July, 1948, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and J. G. Shotwell, an individual trading as J. G. Shotwell, of the City of Albuquerque, in the State of New Mexico,

hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Scope of this Contract—The Contractor shall furnish and deliver for the consideration stated therein the supplies, services, materials and/or equipment set forth in Schedule "A" attached hereto, in strict accordance with the specifications and schedules, which are designated and set forth in said Schedule "A" and all of which are made a part hereof: Schedule "A," Engineer Form No. 719.

Specifications No. Eng-35-026-48-839, dated Portland District, Corps of Engineers, Department of the Army, 628 Pittock Block, Portland 5, Oregon, May 7, 1948.

* * *

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written:

THE UNITED STATES OF
AMERICA,

By /s/ O. E. WALSH,

Colonel, Corps of Engineers,
Contracting Officer.

J. G. SHOTWELL,
(Contractor)

By /s/ J. G. SHOTWELL,

Business Address: 215 South Third, Albuquerque,
New Mexico.

Two Witnesses:

/s/ PAUL R. BAUM,
Murfreesboro, Ark.

.....,
(Address.)

SCHEDULE A

Corps of Engineers

Consisting of 1 page, attached to and made a part of Contract No. W35-026-eng-5686.

Date July 29, 1948.

Invoices: Address and mail in quadruplicate to the District Engineer, Corps of Engineers, Department of the Army, 19 East Poplar Street, Walla Walla, Washington, who will inspect, voucher, and issue bills of lading, if required hereunder.

District Engineer,
19 East Poplar Street,
Walla Walla, Washington.

J. G. Shotwell,
Contractor,
215 South Third,
Albuquerque, New Mexico.

This Schedule A is attached to and made a part of the above-numbered contract. In accordance with the terms and conditions thereof the contractor will furnish the following:

By authority of the Civilian Production Administration the preference rating indicated is assigned to the deliveries on this contract.

Preference Rating:

Schedule A					
Item No.	Supplies or Services	Quantity	Unit	Unit Price	Total Price
1a	Coarse aggregate deposited into designated storage piles	940,000	Ton	\$1,135	\$1,066,900.00
2a	Fine aggregate deposited into designated storage piles	380,000	Ton	1,135	431,300.00
Total Schedule A					\$1,498,200.00

Engineer Form No. 719.

EXHIBIT B

Corps of Engineers, U. S. Army
Office of the District Engineer

Walla Walla District
19 E. Poplar Street,
Walla Walla, Washington

June 28, 1950.

Mr. J. G. Shotwell,
Aggregate Contractor,
Umatilla,
Oregon.

Dear Sir:

The following statement, which is in connection with the hauling of concrete aggregate from your

aggregate plants at Berrian Island to the aggregate stockpile by your subcontractor, Keith Williams Company, is furnished you in compliance with your verbal request of June 27, 1950, to the Resident Engineer at McNary Dam:

Your aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. Your aggregate plants and truck hauling over the Government right-of-way were considered by this office to be within the work area of the McNary Dam project. The aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company was incorporated into the McNary Dam concrete structures.

Very truly yours,

/s/ WM. WHIPPLE,

Colonel, Corps of Engineers,
District Engineer.

(Copy)

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant by the United States Attorney for the Western District of Washington and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Paragraph 1 is admitted.

II.

Paragraph 2 is admitted.

III.

Paragraph 3 is denied except that it is admitted that Exhibit A attached to the complaint is a copy of a contract between the Department of the Army and the plaintiff.

IV.

Paragraph 4 is admitted.

V.

Subparagraph 1 of paragraph 5 is denied. Subparagraph 2 of paragraph 5 is denied except that it is admitted that the plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the amount of \$505,606.54 under a contract for the movement of aggregates from Government-owned property on Berrian Island over Government-owned roads to the McNary Dam site.

VI.

Paragraph 6 is admitted.

VII.

Paragraph 7 is denied.

VIII.

Paragraph 8 is denied.

IX.

Subparagraph of paragraph 9 is admitted except that it is denied that there was any overpayment of taxes on the transportation of property or that any taxes were illegally assessed or collected from the plaintiff. Subparagraph 2 of paragraph 9 is admitted except that the truth of the contents of the claim for refund is denied.

X.

Paragraph 10 is denied. On the contrary it is alleged that the claim for refund was rejected in full by letter dated August 4, 1954.

XI.

Paragraph 11 is denied.

XII.

Paragraph 12 is denied.

Wherefore, having answered, the defendant prays that the plaintiff's complaint be dismissed and the defendant awarded its allowable costs.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ EDWARD J. McCORMICK, JR.,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY PLAINTIFF

Comes now, J. G. Shotwell, plaintiff, by his counsel of record, Meredith M. Daubin, and moves this Court for Summary Judgment on the Complaint and Answer and the Affidavit of J. G. Shotwell submitted herewith, and for cause shows that:

1. The above-entitled cause is at issue.
2. The answer of the defendant does not present a disputed question of a material fact.
3. The transactions existing in the present case do not constitute transportation of property from one point in the United States to another point within the meaning of Section 3475 (now Section 4272) of the Internal Revenue Code.

Wherefore, it is moved that this Court award the plaintiff Judgment against the defendant in the amount of \$15,168.20 together with interest thereon from the respective dates on which it was paid together with costs and disbursements of this action.

/s/ MEREDITH M. DAUBIN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF J. G. SHOTWELL IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

J. G. Shotwell, first being duly sworn upon his oath, deposes and says as follows:

1. J. G. Shotwell (plaintiff) is a citizen of the United States of America; his present address is 5908 Southeast 20th Street, Mercer Island, Washington; former address, Umatilla, Oregon.

2. This action arises to recover taxes assessed and collected under Section 3475 of the Internal Revenue Code on the transportation of property; said taxes were collected from J. G. Shotwell (plaintiff) by Hugh H. Earle as the United States Collector of Internal Revenue for the District of Oregon, Portland Oregon; said Earle is not now the Collector of Internal Revenue for the District of Oregon and he is now out of the said office.

3. July 29, 1948, the Department of the Army, the United States of America, contracted with J. G. Shotwell (plaintiff) to move large quantities of coarse and fine aggregates to the McNary Dam, Umatilla, Oregon, to be used by the Government and to be incorporated in the Government-owned McNary Dam. The coarse and fine aggregates were a part of Berrian Island, Washington, which is a Government owned property five miles upstream from the McNary Dam site. A photostat copy of the

contract is attached as Exhibit "A" to the complaint and is incorporated herein by reference.

4. The haul road from Berrian Island, Washington to the McNary Dam site was on Government-owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam, determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure.

A copy of a letter from the District Engineer, Corps of Engineers, United States Army, dated June 28, 1950, is attached as Exhibit "B" to the complaint and is as follows:

Corps of Engineers, U. S. Army
Office of the District Engineer

Walla Walla District
19 E. Poplar Street
Walla Walla, Washington

June 28, 1950.

Mr. J. G. Shotwell,
Aggregate Contractor,
Umatilla, Oregon.

Dear Sir:

The following statement, which is in connection with the hauling of concrete aggregate from your aggregate plants at Berrian Island to the aggregate

stockpile by your subcontractor, Keith Williams Company, is furnished you in compliance with your verbal request of June 27, 1950, to the Resident Engineer at McNary Dam:

Your aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. Your aggregate plants and truck hauling over the Government right-of-way were considered by this office to be within the work area of the McNary Dam project. The aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company, was incorporated into the McNary Dam concrete structures.

Very truly yours,

/s/ WM. WHIPPLE,

Colonel, Corps of Engineers,
District Engineer.

5. Attached hereto as Exhibit "D" is a copy of the subcontract between J. G. Shotwell (plaintiff) and Keith Williams concerning the movement of the aggregates from Berrian Island to the McNary Dam site.

6. J. G. Shotwell (plaintiff) paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the sum of \$505,605.54 under the subcontract for the movement of the aggregates from Govern-

ment-owned Berrian Island over Government-owned roads to the McNary Dam site.

7. The aggregates were incorporated in the McNary Dam structure, which is Government-owned.

8. Attached hereto as Exhibit "E" is a pictorial folder of "McNary Dam" constructed under supervision, Corps of Engineers, U. S. Army, Walla Walla District, showing the McNary Reservoir created by the McNary Dam.

Between the areas designed in the folder "Hat Rock State Park" and "Berrian" lies, now submerged Berrian Island from which the aggregates were moved to the McNary Dam site to be incorporated in the McNary Dam structure.

9. The Collector of Internal Revenue, Portland, Oregon, Hugh H. Earle, assessed to J. G. Shotwell (plaintiff) and J. G. Shotwell (plaintiff) has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as Federal Transportation Tax under Section 3475 of the Internal Revenue Code at the rate of 3% on the above payment of \$505,606.54.

10. April 28, 1952, J. G. Shotwell (plaintiff) filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for refund of this \$15,168.20 asserting that it was an overpayment of tax on transportation of property and that it was illegally assessed and collected in November and December, 1951.

A copy of the claim is attached as Exhibit "C" to the complaint and is incorporated herein by reference.

11. A period of more than six months has elapsed since the filing of the said claim for the refund of the amount assessed and paid as federal transportation tax of \$15,168.20 and the claim was rejected by the Commissioner of Internal Revenue on or about August 4, 1954.

12. The Commissioner of Internal Revenue, under dates of June 12, 1951, and September 6, 1951, addressed letters to Meredith M. Daubin relative to the tax liability of J. G. Shotwell (plaintiff) for transportation tax on the payments made to Keith Williams as described above. The letters are attached as Exhibits "F" and "G."

13. The defendant, United States of America has not repaid, refunded or credited to J. G. Shotwell (plaintiff) the said sum of \$15,168.20 but has retained the said sum and refuses to repay the same to J. G. Shotwell.

14. The defendant, United States of America has illegally exacted and collected from J. G. Shotwell (plaintiff) the sum of \$15,168.20 and there is owing to J. G. Shotwell the said sum of \$15,168.20 together with interest thereon from the respective dates on which it was paid to the Collector of Internal Revenue for the District of Oregon, Portland, Oregon.

/s/ J. G. SHOTWELL.

County of King,
State of Washington—ss.

Subscribed and sworn to before me this 5th day
of July, 1955.

[Seal] /s/ ELROY F. WIENL,
Notary Public.

Copies received July 19, 1955.

UNITED STATES ATTORNEY,
Seattle, Washington.

By /s/ A. M. PETERS.

Shotwell vs. U. S.

No. 3826

Exhibit "A"

United States Corps of Engineers, Contract No.
W35-026-eng-5686 dated July 29, 1949.

Attached to complaint.

Exhibit "B"

United States Corps of Engineers, Letter signed
Col. Wm. Whipple, dated June 28, 1950.

Attached to complaint.

Exhibit "C"

Claim for Refund of \$15,168.20 filed April 28,
1952.

Attached to complaint.

EXHIBIT D

This Contract, entered into this . . day of October, 1948, by and between J. G. Shotwell, of Albuquerque, New Mexico, hereinafter called the General Contractor, and Keith Williams, of Vicksburg, Mississippi, hereinafter called the Subcontractor, Witnesseth:

Whereas, the General Contractor has entered into a contract with the United States of America, under date of July 29, 1948, for the furnishing of concrete aggregate for McNary Dam, located on the Columbia River, Oregon and Washington, being Contract No. W35-026-eng-5686 of the United States Corps of Engineers, War Department, hereinafter referred to as the General Contract; and

Whereas, there is included in said contract certain items of work wherein hauling of approximately 1,320,000 tons of aggregate from source of supply or deposits thereof on Berrian Island, in the Columbia River, to the General Contractor's processing plant to be located at site designated for storage piles for said aggregate at the Government's reclaiming tunnel at the site of said dam as provided in said General Contract, is required to comply with the schedule of United States Corps of Engineers Specifications, Serial No. Eng. 35-026-48-839, which are attached to and made a part of said General Contract; and

Whereas, the parties hereto mutually desire that said items of work consisting of said hauling shall

be subcontracted by the General Contractor to the Subcontractor;

Now, Therefore, in consideration of the premises and the covenants and conditions herein contained, it is agreed between the parties hereto as follows:

1. That in consideration of the prices hereinafter stated the Subcontractor shall furnish all of the equipment and materials and supplies, and shall perform all the work necessary or required to fully complete the above items of work of hauling in strict accordance with the General Contract and said Specifications, Serial No. Eng. 35-026-48-839, all of which are made a part of this agreement. The Subcontractor agrees that he has read the General Contract and Specifications and drawings, and that he fully understands the same, and that he agrees to be governed by each and all of the provisions and requirements of same on all his operations and to fully perform and comply therewith to all intents and purposes as though the same were herein set out in full, and the Subcontractor does hereby assume toward the General Contractor all of the obligations and responsibilities that the General Contractor by said documents assumes toward the United States of America.

2. Work shall be commenced by the Subcontractor at the time rendered necessary and required by the terms of said General Contract, and carried on at a rate of progress so as to keep at least 6,000 tons of aggregate in the storage pile at the General Contractor's processing plant, provided that the General

Contractor does not produce more aggregate than the Government is required to pay for for the current month pursuant to the terms of said General Contract, and the Subcontractor shall fully complete such work on or before the date rendered necessary or required therefor by said General Contract. It is understood and agreed that the Subcontractor shall furnish sufficient, satisfactory and adequate equipment and experienced workmen to make the progress and do the work in accordance with the schedule herein and by said General Contract required. The Subcontractor shall employ workmen who will at all times work in harmony with the General Contractor's men.

3. The General Contractor shall build an adequate road from the entrance to the gravel bar on said Berrian Island to the General Contractor's plant at the Government's reclaiming tunnel afore-said, and shall maintain the same in such condition as to provide reasonable hauling conditions for the Subcontractor at all times. The Subcontractor shall assist in the construction of said road through the hauling of gravel and other materials therefore. The General Contractor shall also build a necessary road or roads on Berrian Island. Said roads on Berrian Island shall be maintained by the Subcontractor, but the General Contractor shall furnish a water truck for use in connection with such maintenance, which truck shall be operated by the Subcontractor.

4. The amount to be paid the Subcontractor by the General Contractor for work completed and ac-

cepted is the sum of 40c per ton for the hauling of said aggregate. The tonnage to be paid by the General Contractor to the Subcontractor shall be the same as the amount thereof delivered to and paid for by the Government pursuant to the General Contract; provided, that should the waste in processing said aggregate exceed 5%, then the aggregate hauled by the Subcontractor in excess of such 5% shall be paid for by the General Contractor at such rate of 40c per ton; and provided further, that the Subcontractor shall be paid at said rate per ton for any excess processed material which he may have hauled and which may remain on hand upon completion of the contract and not be accepted by the Government. The parties shall conduct substantially uniform operation in conformity with the requirements of said General Contract. Said aggregate shall be loaded on the Subcontractor's trucks by the General Contractor so as to permit the maintaining of the schedule of deliveries required of the Subcontractor.

5. Payments shall be made to the Subcontractor by the General Contractor in the same manner and in the same percentages and at the same time as payments are made by the Government to the General Contractor in accordance with the terms of the General Contract.

6. The Subcontractor shall take out and carry insurance as required for the General Contractor in the General Contract and shall furnish surety bonds acceptable to the General Contractor in amounts which bear the same proportion to the total amount

of bonds required of the General Contractor by the General Contract as the approximate amount to be paid the Subcontractor hereunder bears to the approximate amount to be paid the General Contractor under the General Contract, to guarantee the faithful performance of this contract and to guarantee payment to persons furnishing labor and material and services used in connection with the performance of this contract.

7. The Subcontractor shall keep accurate records and make all reports required by law with reference to social security taxes, old age benefits, and any other taxes that may be levied or assessed by the United States Government or the State of Washington, and shall pay any and all taxes, levies or assessments under any of such laws before final settlement is made hereunder; provided, that should it be determined that the payments to be made by the General Contractor to the Subcontractor hereunder are subject to Federal transportation tax, then the amount of such tax shall be borne one-half by each of the parties hereto.

8. It is the understanding of both parties hereto that the hauling to be performed hereunder is confined to property and will be over roads wholly owned or controlled by the United States Government, and that the Subcontractor's operations hereunder are not and will not be subject to the jurisdiction of the Department of Transportation of the State of Washington, and should it be determined that this contract is subject to such jurisdiction, the Subcontractor shall obtain any and all necessary

permits to authorize such operation, and of the rate of charge to be paid for all of the hauling of aggregate as fixed hereby, and in case of the Subcontractor's failure or inability so to do, this contract shall be subject to immediate termination by notice in writing by the General Contractor to the Subcontractor.

9. The Subcontractor shall not assign this contract nor any right thereunder, nor any part thereof, without the prior written consent of the General Contractor.

10. The Subcontractor shall have no claim against the General Contractor for costs or damages arising from causes beyond the reasonable control of the General Contractor and without fault or neglect on his part, unless the General Contractor is able to obtain reimbursement from the United States Government for such costs or damages.

11. Any notice or notices which either party is to give the other hereunder shall be given by delivering the same to the other in person or by depositing the same in the United States Mail, postpaid, addressed to the General Contractor as follows:

J. G. SHOTWELL,
215 So. 3rd Street,
Albuquerque, N. M.

and the Subcontractor as follows:

KEITH WILLIAMS,
P. O. Box 45,
Vicksburg, Mississippi.

In Witness Whereof, the parties have hereunto
set their hands the day and year first above written.

.....,

General Contractor.

Witness as to General Contractor:

.....,

.....

Subcontractor.

Witness as to Subcontractor:

.....

EXHIBIT F

U. S. Treasury Department

Washington 25

June 12, 1951.

Office of Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to ExT:M:RHH

Mr. Meredith M. Daubin,

Dow, Lohnes and Albertson,

Munsey Building,

Washington 4, D. C.

Dear Mr. Daubin:

Reference is made to your letter dated April 4,
1951, submitted in response to a letter addressed to
you under date of March 16, 1951, relative to the

liability of Mr. J. G. Shotwell, Umatilla, Oregon, for payment of tax on the transportation of property in the amount of \$17,634.23 imposed by section 3475 of the Internal Revenue Code. The tax is applicable to amounts which Mr. Shotwell paid to two trucking concerns for hauling services furnished by them during the period October 1, 1948, to June 8, 1950.

In the letter of March 16, 1951, you were advised of the Bureau's determination that the tax in question is due and properly collectible from Mr. Shotwell. You state that the statements made in the letter appear irreconcilable with the facts as presented and for a better understanding of the conclusion expressed in such letter, you request that you be advised with respect to certain queries, which are set forth in the following, together with the answers thereto.

“1. Is it not a fact that the aggregate or gravel deposits at Berrian Island were owned by the United States Government and that the United States Government desired approximately 1,320,000 tons of this aggregate or gravel delivered and deposited in its stock pile at dam-site of McNary Dam?”

It is correct that the aggregate or gravel deposits on Berrian Island were owned by the United States Government. However, with regard to your statement that “the United States Government desired approximately 1,320,000 tons of this aggregate or gravel delivered and deposited in its stockpile at damsite of McNary Dam” your attention is directed

to paragraph SC-19 of the contract which provides, in part, as follows:

“SC-19, Concrete Aggregates—a. Source—
The Contractor shall procure the concrete aggregates from deposits on Berrian Island, which is owned by the Government and is available to the Contractor as a source of supply. There is available within the designated area and within the approved limits shown on the drawings, an adequate supply of material from which concrete aggregates can be processed. The right is reserved, however, to reject certain localized areas, strata, or channels within the approved area and zone when in the opinion of the Contracting Officer, the material is unsatisfactory for use in the structures under consideration. The Contracting Officer has completed preliminary investigations of the aggregate deposits on Berrian Island to determine whether this source can supply aggregates conforming to all of the requirements of Part IV of these specifications. Bids for this work will be evaluated on the premise that the Contractor will furnish all of the aggregate for the concrete from the deposits on Berrian Island, and that the aggregate will meet all the provisions of these specifications. In the event that results of the final tests on the aggregate from deposits on Berrian Island prove to be unsatisfactory, the Contracting Officer reserves the right to require the Contractor to procure satisfactory aggregate from other sources, in which case a change

order will be issued and an equitable adjustment in the consideration of the contract will be made.”

“2. Is it not a fact that this aggregate or gravel was moved by truck from Berrian Island to the stockpile at the damsite over roads entirely upon the property of the United States Government under the Keith Williams subcontract?”

The file in the case contains a copy of a letter dated June 28, 1950, addressed to Mr. J. G. Shotwell, and signed by Wm. Whipple, Colonel, Corps of Engineers, District Engineer, in which it is stated that Mr. Shotwell's aggregate plants at Berrian Island were located on Government property for the purpose of processing gravel from the Government-owned gravel deposits, and the haul road was on a right-of-way which was furnished by the Government. It is also stated that the aggregate produced at the two Berrian Island plants and hauled by the Keith Williams Company, was incorporated into the McNary Dam concrete structures.

“3. Is it understood that the contract with the United States Corps of Engineers, Contract No. W35-026-eng-5686, dated July 29, 1949, in which J. G. Shotwell is the General Contractor, provides for:

“1a. Coarse aggregate deposited into designated storage piles.

940,000—Ton \$1.135\$1,066,990.00

“2a. Fine aggregate deposited into designated storage piles.”

380,000—Ton \$1.135 431,300.00

Total Schedule A.....\$1,498,200.00

The foregoing appears to be a correct copy of the items set forth in Schedule A, attached to, and made a part of the contract in question.

“4. Is it not a fact that the same contract by Article 5, covers damages for ‘Delays in Delivery’?”

Article 5, “Delays—Liquidated Damages,” of the contract provides for certain liabilities against the contractor in case he refuses or fails to make delivery of the materials or supplies within the time specified in Article 1, or any extension thereof.

“5. Is it not a fact that the Commissioner of Internal Revenue has, by unpublished ruling or rulings, held that a statement in contract to the effect that “all applicable excise taxes” are included in the contract price does not include the Federal Transportation Tax on Property as Provided by Section 3475 of the Internal Revenue Code?”

“In other words, in order for the Federal Transportation Tax on Property, as provided by Section 3475 of the Internal Revenue Code, to be included in the contract price, the contract must specifically so state?”

In cases where the question is raised as to whether a payment to a carrier includes transportation tax.

the Bureau is of the opinion that unless it is expressly agreed between the person paying the transportation charges and the carrier that the amount paid to the carrier includes both the transportation charges and the tax applicable thereto, such person is liable for payment of the tax computed on the basis of 3 per cent of the total amount paid to the carrier.

“6. Is it not a fact that by Section 3475 of the Internal Revenue Code, the owner of the property which is the subject of the contract for hauling is, in fact, ultimately liable for the Federal Transportation Tax unless it is included in the contract price?”

The tax imposed by Section 3475 of the Code is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. Ownership of the property transported is immaterial.

In your letter you request a conference on the case at a time convenient.

As set forth in Bureau letter dated March 16, 1951, if a conference is desired your request therefore should include a statement of the day and hour on which you wish to appear for the hearing. Unless notified to the contrary, you may then assume that the date and hour so stated are satisfactory to this office. You should call at Room 6237, Internal Revenue Building, Twelfth Street and Constitution Avenue, N. W., Washington, D. C.

If no request for a hearing is received within fifteen days from the date of this letter, assessment of tax in the amount of \$17,634.23 will be entered against Mr. Shotwell and, upon receipt of notice of tax due from the Collector of Internal Revenue, Portland, Oregon, remittance should be forwarded to his office.

Very truly yours,

/s/ CHARLES J. VALAER,
Deputy Commissioner.

EXHIBIT G

U. S. Treasury Department
Washington 25

Sept. 6, 1951.

Address Reply to
Commissioner of Internal Revenue
and Refer to ExT:M:RHH

Mr. Meredith M. Daubin,
Dow, Lohnes and Albertson,
Munsey Building,
Washington 4, D. C.

Dear Mr. Daubin:

Reference is made to your letter dated June 14, 1951, relative to the liability of Mr. J. G. Shotwell, Umatilla, Oregon, for payment of tax on the trans-

portation of property in the amount of \$17,634.23 imposed by Section 3475 of the Internal Revenue Code. The tax is applicable to amounts which Mr. Shotwell paid to two trucking concerns for hauling services furnished by them during the period October 1, 1948, to June 8, 1950.

In your letter you set forth your conclusions as to the facts of the case and you state that it appears that if any tax liability exists then the United States Government itself is liable since the Government actually paid for the movement of its property. You request to be advised whether this office will proceed against the Government for the tax.

In accordance with the provisions of section 3475 (a) of the Internal Revenue Code the tax on the transportation of property applies only to amounts paid to a person engaged in the business of transporting property for hire.

As you were previously advised in Bureau letter of March 16, 1951, it is the opinion of the Bureau that Mr. Shotwell's contract with the United States Corps of Engineers, Department of the Army, was essentially for the production of aggregates and that Mr. Shotwell was not a "person engaged in the business of transporting property for hire" within the meaning of section 3475(a) of the Code. Therefore, the tax on the transportation of property did not apply to any part of the payments made by the United States Corps of Engineers to Mr. Shotwell for the services furnished by him in the perform-

ance of the contract. However, since the trucking concerns which performed the hauling involved are persons engaged in the business of transporting property for hire and since Mr. Shotwell paid to such concerns the charges for the hauling services, Mr. Shotwell is the person who made the taxable transportation payments and is the person properly liable for payment of the tax, irrespective of the ownership of the property transported. Furthermore, the question whether Mr. Shotwell, under the terms of his contract with the United States Corps of Engineers, is entitled to be reimbursed by the United States Corps of Engineers for any tax he is required to pay is a matter of settlement between those parties and is not a matter within the jurisdiction of this Bureau.

In your letter you also refer to the decision of the United States Court of Appeals, Third Circuit, dated March 13, 1951, in the case of *Edward H. Ellis & Sons, Inc., v. United States*, and you request to be advised whether by the rule of that case the services under the J. B. Shotwell contract are in fact taxable transportation.

The Bureau will follow the decision of the court in the Ellis case in any other case where the facts are identical, i.e. movement of earth in the leveling or grading of an airfield, plant site, or similar project when such movement is restricted within the confines of the project. However, the facts in the Ellis case may be distinguished from the facts in the

instant case and, accordingly, the decision in the Ellis case is not controlling.

In your letter dated June 14, 1951, you indicated a desire for a conference on this case. You state that the selection of a definite date for a conference will be postponed pending receipt of a reply to your letter.

If a conference is still desired, your request therefor should include a statement of the day and hour on which you wish to appear for the hearing. Unless notified to the contrary, you may then assume that the date and hour so stated are satisfactory to this office. You should call at Room 6237 of the Internal Revenue Building, 12th Street and Constitution Avenue, N. W., Washington, D. C.

If no request for a hearing is received within fifteen days from the date of this letter, assessment of tax in the amount of \$17,634.23 will be entered against Mr. Shotwell and, upon receipt of notice of tax due from the Collector of Internal Revenue, Portland, Oregon, remittance should be forwarded to his office.

Very truly yours,

/s/ CHARLES J. VALAER,
Deputy Commissioner.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT

Defendant moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendant's favor dismissing the complaint.

The ground for this motion is that there is no genuine issue as to any material fact underlying the complaint and that the defendant, under the decision of the Court of Appeals for the Ninth Circuit in *Getchell Mines, Inc. v. United States*, 181 F. 2d 987, is entitled to a judgment as to this claim as a matter of law.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

JOINT STIPULATION

Comes now the parties to the above cause by their Counsel, and agree and stipulate as follows:

That the deposition of Bertram W. Hoare, as taken at Walla Walla, Washington, October 27, 1955, including Joint Exhibits 1, 2 and 3, heretofore deposited with the Clerk of The Court, may be filed herein as agreed facts in this cause.

/s/ MEREDITH M. DAUBIN,
Counsel for Plaintiff;

/s/ ARTHUR BIGGINS,
Attorney, Justice Dept.

Washington, D. C., April, 1956.

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff J. G. Shotwell seeks to recover taxes collected under Section 3475, Internal Revenue Code, in the amount of \$15,168.20 together with interest from time of payment.

The Court is presently concerned with motions for summary judgment by both plaintiff and defendant.

By stipulation filed August 13, 1956, the parties have agreed that the deposition of Bertram W. Hoare, the Assistant Chief of Construction Division, Corps of Engineers, United States Army, taken October 27, 1955, including Joint Exhibits 1, 2 and 3, deposited with the Clerk of the Court, may be filed herein as agreed facts in this cause.

A summary of the material facts alleged in plaintiff's complaint and admitted by defendant's answer is the following:

Taxes under Section 3475 of the Internal Revenue Code were collected by Hugh H. Earle as the Collector of Internal Revenue for the District of Oregon who was not in office as Collector at the time this action was commenced;

The Court has jurisdiction over this action under Section 1346(a)(1), Title 28 U.S.C.A.;

Exhibit "A," attached to the complaint, is a copy of a contract between the Department of the Army and the plaintiff;

The haul road from Berrian Island, Washington, to the McNary Dam site was on Government-owned property and the Corps of Engineers, United States Army, in charge of the construction of the McNary Dam determined Berrian Island and the haul road to be within the work area of the McNary Dam project. The aggregates moved from Berrian Island and deposited at the McNary Dam site were incorporated into the McNary Dam concrete structure;

Plaintiff paid to Keith Williams during the period October 1, 1948, to June 8, 1950, the amount of \$505,606.54 under a contract for the movement of aggregates from Government-owned property on Berrian Island over Government-owned roads to the McNary Dam site;

The Collector of Internal Revenue assessed to the plaintiff and the plaintiff has paid to the said Collector of Internal Revenue during November and December, 1951, the sum of \$15,168.20 as federal transportation tax under Section 3475 of the Internal Revenue Code at three (3) per cent on the amount of \$505,606.54;

On April 28, 1952, the plaintiff filed with the Collector of Internal Revenue, District of Oregon, Portland, Oregon, a claim for a refund of \$15,168.20 assessed and collected in November and December, 1951. A copy of said claim is attached to the complaint as Exhibit "C."

Portions of the deposition of Bertram W. Hoare, which the Court deems of interest here, are as follows:

"Q. Would you briefly state the sequence of events which occurred as a result of the construction of the dam axis—the dam at the dam axis?

"A. I presume you mean the general schedule of operations for the complete project? The initial operation was to acquire real estate at the immediate dam site. Following that, construction was instituted of some living facilities for construction

workers in McNary City, and also in the temporary housing area known as Homaja, which was approximately two miles upstream from the dam on the Washington shore. McNary City was located on the Oregon shore, the nearest point to the dam itself being approximately one-half mile and the furthest point a mile and a half from the Oregon abutment. The next operation was the construction of certain access facilities to the dam site, followed by a contract for the excavation of the area in which the navigation lock was to be constructed. This lock was built on the Washington end of the dam. At about the completion of the excavation contract, a contract was entered into with Mr. J. G. Shotwell for obtaining the processing and the stockpiling of aggregates for concrete which was to be used in the construction of the lock and of the Washington end of the dam. * * *

“Q. What was the reason for the separate aggregate contract in reference to the first major construction?”

“A. I presume you mean Mr. Shotwell’s contract?”

“Q. Yes.

“A. That contract was made separately so that work could be instituted procuring the aggregates and actually having it stockpiled so as to expedite the construction of the navigation lock. It was a matter of planning to supply the aggregate to the construction contractor to shorten the time required by him between his notice to proceed and the date at which he could be placing concrete. It was also

intended should there be other auxiliary work undertaken that the Government could also furnish aggregate to other contractors in small amounts.

“ * * *

“A. The aggregate processing plants on Berrian Island were located—and referring to Joint Exhibit 3, in Lot 1 of Section 8, Township 5 North, Range 29 East, and upstream in Lot 4 of the same section. The road used to haul the material to the dam site is shown on Exhibit 3 and is marked with the word ‘road.’ It is that road which lies immediately to the north of the S. P. & S. Railroad before relocation. The continuation of this road is shown by a dashed symbol on Exhibit 2 on the north side of the S. P. & S. Railroad right of way. The haul road continued downstream to a point approximately a quarter of a mile below the dam axis, at which point was located a re-claiming tunnel over which the aggregates were dumped. This applied to all aggregate, excepting the sand which was further processed in the vicinity of the re-claiming tunnel. Mr. Shotwell’s responsibility and execution of his contract ended with the delivery of the materials in stockpiles at this point. * * *”

“Q. Is it a fact that the Government wanted the gravel it owned on Berrian Island in the McNary project moved to the McNary dam site so that the gravel could be incorporated in the McNary Dam? A. It is, * * *.

“Q. The gravel removed by Shotwell on Berrian Island was hauled over Government right of ways to the dam structure and used therein?

“A. That is correct.

“Q. Then it is not a fact that the gravel on Berrian Island and the haul roads were all a part of the work area of the dam construction?

“A. * * * I would consider that Berrian Island was within the project area, although it would not appear to be what would normally be considered within the dam construction area.”

The Court is of the opinion that no genuine issue as to any material fact exists.

In his reply brief, filed August 13, 1956, plaintiff states his contention as follows:

“The plaintiff contends that this movement of gravel solely within the confines of the project and used as an integral part of the construction project is not taxable as ‘transportation’ of property from one point in the United States to another under Section 3475.”

In *Getchell Mine v. United States*, 181 F. 2nd 987, 990, the Court of Appeals for the Ninth Circuit discussed questions pertinent here:

“(4) Appellant argues that the word ‘point,’ means the same as ‘place,’ and that since the whole enterprise of appellant, the mining, milling and hauling, were conducted upon its own ground, which was a single ‘place,’ the transportation was not ‘from one point in the United States to another.’

“We think Section 3475(a) is not susceptible of such a construction, and that the hauling here was

from point to point within the meaning of the Act. The case of *Lyle v. United States*, D. C., 76 F. Supp. 787, upon which reliance is had, held no more than that the use of trucks in grading an airfield, where the trucks were used to haul earth from a power shovel to dumps and fills, was not a use for transportation under the Act. We regard it as not apposite here. * * *

Plaintiff relies heavily upon *Edward H. Ellis & Sons v. United States*, decided March 13, 1951, 3 Cir., 187 F. 2d 698.

The state of facts under which the tax was imposed in the *Ellis* case are set out in the opinion of Judge McLaughlin as follows:

“Appellee, a general contractor, agreed with the Texaco Company that it would clear, level and grade a tract of land owned by the Texaco Company in West Deptford Township, New Jersey, on which the Texaco Company proposed to construct a large oil refinery and storage plant.

“In connection with the clearing, leveling and grading of the tract, appellee entered into an oral subcontract with one Krantz whereby the latter was to furnish appellee with trucks and drivers to assist in that project. Krantz was to be paid at an hourly or daily rate per truck. His trucks were used exclusively within the boundaries of the tract. They moved earth from points in the area where it was being excavated to points in the same area where it was needed as fill. The trucks were loaded by grad-

ing shovels. They carried the earth distances varying from three hundred feet to one mile. Where the distance from an excavation to a place which was to be filled was less, appellee itself moved the earth by means of men with hand shovels, bulldozers, carry-alls or otherwise. Krantz, admittedly, is in the trucking business and within the statutory definition of “ * * * a person engaged in the business of transporting property for hire * * *.”

The Court of Appeals detailed its reasons for agreeing with the finding of the District Judge that the transactions in the Ellis case did not constitute transportation of property from one point in the United States to another within the meaning of Section 3475 of the Internal Revenue Code:

“(2) The other minor query is whether the earth carried by the Krantz trucks was ‘property’ as intended by the statute. We think it was and if the facts really pointed to its ‘transportation’ we would not have the slightest difficulty in upholding the tax. But it is on that vital issue of whether the moving of the earth, under the circumstances before us, constituted ‘transportation * * * from one point in the United States to another, * * *’ as contemplated by Section 3475 we differ from appellant. The operation by the Krantz trucks was an integral part of the construction of the oil company’s plant. It concerned the clearing, grading and leveling of the premises for that sole purpose. It did not concern transportation as that term is commonly employed.

We are entitled to consider that the use of the word in the Code was confined to its ordinary sense. * * *

“(3) This movement of earth, an important element in the initial steps of the erection of the Texaco plant, namely, the clearing, grading and leveling of the tract, fails to meet the everyday usage of the term transportation. It fails in evidencing any kinship to the various meanings of the word given in the Treasury Regulations supplementing Section 3475. It fails of any support at all in the reported cases under Section 3475.”

In *Lyle v. United States*, N.D.Ga., 76 F. Supp. 787, cited by plaintiff, the decision of the District Judge against the Commissioner of Internal Revenue was based upon facts similar to those found in *Ellis v. United States*, *supra*. The hauling in that case was in the construction of an airfield and involved moving earth incidental to grading and leveling of the airfield. The movement of earth in the *Ellis* and *Lyle* cases constituted an integral part of the construction there considered.

It will be noted that in his deposition Mr. Hoare testified “Mr. Shotwell’s responsibility and execution of his contract ended with the delivery of the materials in stockpiles” at a re-claiming tunnel. The movement of the aggregates from Berrian Island to the stockpiles by Williams amounted to a movement or transportation of material intended to be used in the construction of McNary Dam. The aggregates or gravel moved by Williams were not taken from excavations necessarily made in connection

with the clearing, leveling or grading of the actual dam site or taken from excavations made for the preparation of installations or foundations or other structures constituting the McNary Dam. It is obvious that the movement of the aggregates or gravel in the present case was not an integral part of the construction of McNary Dam.

Williams, in the carrying out of his contract, was a person engaged in the business of transporting for hire.

In *Bridge Auto Renting Corporation v. Pedrick*, 2 Cir., 174 F. 2d 733, the Court, in the course of its opinion, stated, on page 738:

“(2) * * * Without repeating in detail what the appellant did to earn the receipts which were taxed, it did in the aggregate all that was reasonably necessary to be done to transport its customer's property. Indeed, it is plain enough that these customers, regardless of what else they saw fit to do, had only to provide the goods for transport, direct the drivers where to take them and pay the appellant for performing the transportation service. It cannot be said that such service for pay did not make the appellant a person transporting property for hire to that extent even though in doing the greater part of its business it was otherwise engaged. While it may be that some of the M.C.C. decisions above cited rest in part on the fact that where a person is already engaged in the business of transporting property for hire, some special arrangement it makes for the use of part of its transportation facilities may be

the more readily recognized as but a variation in form without a change in substance from its regular business, whatever does in fact amount to transporting property for hire brings the person who does it within this taxing statute although no other part of his business does so or has done so."

Plaintiff's motion for summary judgment is denied.

Defendant, United States of America, is entitled to judgment as a matter of law and to recover costs herein incurred and is directed to prepare and submit a form of judgment.

Dated: This 23rd day of November, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed November 30, 1956.

In the United States District Court for the Western
District of Washington, Northern Division
Civil No. 3826

J. G. SHOTWELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Plaintiff having appeared in person by his attorney, Meredith M. Daubin, and the defendant having

appeared by Charles P. Moriarty, United States Attorney, and Arthur L. Biggins, attorney, Tax Division, Department of Justice, and a joint stipulation having been submitted by the parties and the Court having considered such stipulation

It Is Hereby Ordered and Adjudged that this action be dismissed on the merits and the defendant allowed his costs.

Dated at Seattle, Washington, this 28th day of March, 1957.

/s/ ROGER T. FOLEY,
United States District Judge.

Presented by:

/s/ THOMAS R. WINTER,
Of Counsel for U. S.

[Endorsed]: Filed and entered April 1, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America, defendant above named, and to Charles P. Moriarty, United States Attorney for the Western District of Washington.

Notice Is Hereby Given that J. G. Shotwell, the plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from that certain Judgment of Dismissal dated March 28, 1957, and signed by The Honorable Judge Roger T. Foley and entered and filed in the above-entitled cause on April 1, 1957.

MEREDITH M. DAUBIN,

By /s/ WILBUR ZUNDEL,

Attorneys for Appellant
J. G. Shotwell.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, together

with a true copy of the docket entries, said papers and documents being identified as follows:

Docket entries,

1. Complaint, filed Nov. 18, 1954.
3. Answer of defendant, filed Jan. 20, 1955.
4. Plaintiff's Motion for Summary Judgment, filed July 19, 1955.
6. Affidavit of J. G. Shotwell in Support of Plaintiff's Motion for Summary Judgment, filed July 19, 1955.
8. Motion for Summary Judgment by Defendant, filed Aug. 11, 1955.
13. Joint Stipulation of Facts, filed Aug. 13, 1956.
10. Deposition of Bertram W. Hoare, filed Jan. 4, 1956, together with Joint Exhibits 1, 2 and 3.
14. Decision on Motions for Summary Judgment, filed Nov. 30, 1956.
15. Judgment, filed April 1, 1957.
17. Notice of Appeal, filed April 26, 1957.
18. Bond for Costs on Appeal, filed April 26, 1957.
19. Plaintiff's Designation of Record on Appeal, filed April 26, 1957.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellant for preparation of the record on appeal in this cause, to wit: Filing Notice of Appeal, \$5.00;

and that said amount has been paid to me by counsel for the appellant.

Witness my hand and official seal at Seattle this 23rd day of May, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15563. United States Court of Appeals for the Ninth Circuit. J. G. Shotwell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 24, 1957.

Docketed: May 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 15563

J. G. SHOTWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS TO BE RELIED UPON
BY APPELLANT

1. The District Court erred in denying the Plaintiff's Motion for Summary Judgment.
2. The District Court erred in not granting Plaintiff's Motion for Summary Judgment.
3. The District Court erred in not denying Defendant's Motion for Summary Judgment.
4. The District Court erred in determining that the United States of America is entitled to Judgment as a matter of law.
5. The District Court erred in entering the Judgment in this cause against the Plaintiff, J. G. Shotwell and for the Defendant, United States of America.
6. The District Court erred in not entering a Judgment for Plaintiff and against Defendant, United States of America.

7. The District Court erred in not finding that the movement of gravel solely within the confines of the project and used as an integral part of the construction project is not taxable as 'transportation' of property from one point in the United States to another under Section 3475 of the Internal Revenue Code.

/s/ MEREDITH M. DAUBIN,
Attorney for Appellant.

[Endorsed]: Filed June 4, 1957.